STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WASTE MANAGEMENT OF NEW YORK, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1983 through August 31, 1986.	:	

Petitioner, Waste Management of New York, Inc., 101 Ontario Street, Rochester, New York 14445, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through August 31, 1986 (File No. 805791).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on May 4, 1989 at 9:15 A.M., with all briefs to be submitted by September 12, 1989. Petitioner appeared by Moot & Sprague (Arnold N. Zelman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether petitioner's purchase of containers, compactors, container and compactor repair parts and services, and portable toilets constituted a sale of tangible personal property to petitioner for use by petitioner in performing a waste removal service taxable under Tax Law § 1105(c)(5), where the property so sold was later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

II. Whether the containers, compactors, container and compactor repair parts and services, and portable toilets were purchased by petitioner exclusively for resale as such and were therefore not retail purchases of tangible personal property taxable under Tax Law § 1105(a).

FINDINGS OF FACT

On April 16, 1987, following an audit, the Division of Taxation issued to petitioner, Waste Management of New York, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $58,120.35 in tax due, plus interest, for the period September 1, 1983 through August 31, 1986.

Petitioner is in the business of waste removal. It is organized into several divisions, two of which are relevant herein -- Waste Management of Rochester, 101 Ontario Street, East Rochester, New York and Downing Container Service, 191 Ganson Street, Buffalo, New York.

The assessment herein results from a Division determination that petitioner improperly

failed to pay sales and use taxes on its purchase, during the audit period, of containers, compactors, repair parts and repair services for containers and compactors, and portable toilets. The Division's assessment was premised upon its position that the aforementioned purchases were used by petitioner in connection with taxable services. The computation of the assessment is not in dispute.

The assessment may be categorized as follows:

	Tax Assessed
Container Purchases	$28,480.56
Compactor Purchases	12,019.73
Port-O-Let Purchases	3,211.07
Container and Compactor Repair Parts Purchases	13,066.57
Outside Service Purchases	171.26
Container Rental	313.77
Landfill Repair Expenses[1]	857.39
Total	$58,120.35

Containers and Compactors

Petitioner's business primarily involves waste removal using large containers and compactors, bulk pickups and residential (curbside) pickups. With respect to waste removal using containers and compactors, petitioner's business, with few exceptions (see Finding of Fact "15", infra), consisted of supplying industrial and commercial customers with a container or a compactor for the collection of refuse and periodically removing this refuse from the customer's premises. Petitioner entered into standard service agreement contracts with its customers setting forth the specific obligations of the parties, including the type, size and quantity of containers or compactors to be provided by petitioner and the frequency of refuse removal by petitioner from the customer's premises. The standard service agreement was for a minimum of one year with an automatic annual renewal provision.

The containers purchased by petitioner during the audit period fall into two general categories. First are front-loading containers with capacities ranging from 2 to 10 cubic yards. These containers are unloaded by specially equipped trucks which empty the contents of the container directly into the truck. Petitioner also purchased large, open-top containers, called roll-offs, with capacities ranging from 15 to 40 cubic yards. Roll-offs are emptied using a truck which lifts the roll-off container onto its chassis, travels to a disposal site, unloads the waste and returns the empty container to its previous location.

Petitioner also purchased compactors during the audit period. This equipment, which uses hydraulics to compact trash, is used in conjunction with a roll-off type of container. The compactor is anchored to the ground and the container is attached to it. To empty the container, it is decoupled from the compactor and removed to a disposal site in the same manner as a roll-off.

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[1]At hearing, petitioner conceded its liability with respect to the landfill repair expenses component of the assessment.

Pursuant to the service agreements, petitioner supplied its customers with the container or compactor best suited to the particular customer's needs. Petitioner subsequently removed the trash accumulated in the containers by the customer using the methods and equipment described above (Findings of Fact "6" and "7"). The frequency with which petitioner removed a customer's trash was also based upon the particular customer's needs.

Among the terms contained in petitioner's standard service agreements were the following:

> "CUSTOMER'S DUTIES AND LIABILITY. The equipment provided by Contractor [petitioner] is done so for Contractor's convenience in providing the service called for by this Agreement.
>
> Customer shall be responsible for the cleanliness and safekeeping of the equipment.
>
> Customer shall not make any alterations or improvements to the equipment without the prior written consent of the Contractor.
>
> Customer shall not overload the equipment, nor use it for incineration purposes, and shall be liable to Contractor for loss or damage in excess of reasonable wear and tear.
>
> * * *
>
> All equipment furnished by the Contractor for use by the Customer which the Customer has not purchased, shall remain the property of the Contractor and the Customer shall have no right, title or interest in equipment.
>
> Customer agrees to defend, hold harmless and indemnify Contractor against all claims, lawsuits and any other liability of injury to persons or damage to property or the environment connected with the use of the equipment by the Customer or breach of any warranty by the Customer."

During the audit period, petitioner had slightly different billing practices with respect to its containers and compactors. For compactors, petitioner's service agreements and invoices separately stated a "compactor use charge" and a charge per haul to dispose of the customer's accumulated waste. For containers, petitioner sometimes separately stated a "container use charge" and a charge per haul on its service agreements and invoices. Petitioner also sometimes listed one lump sum on its container service agreements and invoices. In the case of petitioner's Downing Container division, this inconsistency with respect to containers resulted from either a desire by the customer to be billed in a lump sum or a desire by petitioner to make its invoices simpler by billing one amount rather than two separate charges. In the case of petitioner's East Rochester division, certain of its government contracts required that bids for work be submitted at a single flat rate. Such customers were therefore billed at a single rate. Petitioner introduced one such bid proposal into the record herein (Exhibit "12"). While the bid proposal sets forth one flat fee for "Refuse Container Service", it also indicates, under a heading encaptioned "Location and Service Requirements", that petitioner will "rent" various containers at various locations. The proposal also indicates that, with respect to the scope of work at a particular location, "the cost of renting the containers throughout the term shall be included in the bid price."

With respect to compactors, petitioner's East Rochester division also required the execution of a standard, five-year "Equipment Lease Agreement" calling for monthly "rental

payments". The "Equipment Lease Agreement" provided that the entire agreement was conditional upon the customer/lessee's utilization of petitioner/lessor's hauling and disposal services exclusively during the term of the agreement. Petitioner's requirement that its customers execute such five-year agreements was premised upon the high cost to petitioner of purchasing such equipment.

During the audit period, petitioner also incurred costs in repairing and maintaining its containers and compactors then located on customers' premises. Generally, petitioner purchased repair parts and made the repairs using its own employees. Occasionally, petitioner hired an outside contractor to make the repairs. The cost of such repair parts and services resulted in the repair parts purchases and outside services purchases components of the assessment.

Petitioner also rented containers for its own use from other companies. Such rental resulted in an assessment of $313.77.

Petitioner's charges for "container use" or "compactor use" varied depending upon the competition. Among the factors in determining the "container use" or "compactor use" charges was the number of times the customer required petitioner's dumping service. The greater the frequency of dumping service, the greater the likelihood that petitioner would offer a more favorable "use" charge.

As previously noted, nearly all of petitioner's customers sought from petitioner both a container/compactor and the removal by petitioner of trash accumulated therein. Petitioner sought to provide all of its customers this "complete package". Petitioner also, however, had a small number of customers to which it provided a container/compactor without providing the trash removal service. The East Rochester division identified 9 customers out of about 1,400 accounts to whom it provided containers or compactors without trash removal. Many of these customers used the containers for storage on a short-term basis. Additionally, in a handful of cases, petitioner provided its trash removal service to customers who supplied their own container or compactor.

At the termination of its service agreements petitioner re-took possession of its containers and compactors and re-used this equipment in connection with other customers.

Petitioner could, and in fact did, in some cases, provide waste removal services without the use of containers or compactors. The use of containers and compactors, however, enabled petitioner and its customers to have waste removed in a much more clean and efficient manner.

Port-o-lets

Petitioner's East Rochester division was also in the business of providing and periodically cleaning portable toilets, known as Port-o-lets, for customers. Petitioner's customers wanted portable toilets to provide sanitation facilities in places where none were then located. Petitioner delivered the Port-o-lets to the customer's site where they were used by customers to reduce off-site time spent by employees and others to use sanitation facilities.

Petitioner returned to the customer's site on a periodic basis (usually weekly but sometimes more frequently) to clean the unit or units located there. Petitioner pumped the waste out of the unit, replenished the unit with fresh water and chemicals, washed the entire unit out, and replaced the toilet paper.

The Port-o-let service was provided by petitioner pursuant to standard "Service

Agreements", the terms of which provided, in relevant part, the following:

"2. Use by Customer.

(a) Customer has inspected the equipment and finds it to be in good condition and suitable for his needs.

(b) Customer will permit the equipment to be used only for the proper sanitation purposes for which it was intended.

(c) Customer will make no alterations or attachments to the equipment.

(d) Customer has chosen the location for installing the equipment and accepts all responsibility in connection with that choice of location.

(e) Customer will give Port-O-Let [petitioner] free access to the equipment at all times over suitable pavement or other driving surface, and will make the equipment available for servicing or maintenance at ground level without hazard to Port-O-Let's agents, employees or equipment.

(f) Customer will notify Port-O-Let immediately and discontinue use of the equipment if the equipment becomes unsafe or in disrepair for any reason.

(g) Customer will not permit the equipment to become subject to any lien, charge or encumbrance.

3. Maintenance. Port-O-Let will recharge and service the equipment in accordance with the terms set forth on the front of this Agreement. Port-O-Let's obligation to maintain the equipment in good working order under ordinary use is conditioned upon Customer's compliance with the use obligations set forth in paragraph 2.

4. Customer's indemnity. Customer will indemnify Port-O-Let, its employees and agents against any claim, liability or cost arising from this agreement or the use of the equipment, including property damage and personal injuries, except to the extent that such claims, liabilities or costs are due to Port-O-Let's sole negligence. Customer will promptly reimburse Port-O-Let for any damage to or loss of the equipment. Equipment damage beyond repair will be paid for by Customer at replacement cost."

The Port-o-let service agreements and invoices each listed a single charge, "service charge per month" and "flat rate service", respectively.

Petitioner also provided Port-o-lets to customers for special events pursuant to a "Special Event Agreement" contract having terms and conditions identical to those contained in the "Port-o-let Service Agreement".

There is no evidence in the record that petitioner provided portable toilets without the cleaning service or vice-versa.

Petitioner charged and collected sales tax upon all charges to its (non-exempt) customers in respect of its waste removal and portable toilet business.

CONCLUSIONS OF LAW

A. Generally, retail sales of tangible personal property are subject to sales or use tax (Tax Law §§ 1105[a]; 1110). A "sale" for sales tax purposes includes a rental (Tax Law § 1101[b][5]). "Retail sale" is defined at Tax Law § 1101(b)(4)(i) and provides, in relevant part, as follows:

> "A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

Waste removal services are taxable pursuant to Tax Law § 1105(c)(5).

B. The first issue to be addressed is whether petitioner's purchase of containers, compactors, repair parts for containers and compactors, and portable toilets met the requirements of Tax Law § 1101(b)(4)(i)(B).

The phrase "actually transferred", as used in clause (B) of Tax Law § 1101(b)(4)(i), is to be given its "commonly accepted meaning" (Matter of Chem-Nuclear Systems, Inc., Tax Appeals Tribunal, January 12, 1989, citing Building Contractors Assoc., Inc. v. Tully, 87 AD2d 909, 910).

Here, physical possession of all of the equipment at issue was clearly transferred to petitioner's customers. The customers obviously had the right to use, and, in fact, did use the equipment to store and accumulate waste. As to the duration of possession, the standard container and compactor agreements were for one year with automatic annual renewals. Additionally, petitioner's East Rochester division required its compactor customers to enter into five-year agreements. While the average length of the Port-o-let service agreements is not in the record, it is clear that the customer had physical possession and control of the Port-o-lets for the entire time the service agreements were in effect. Also, with respect to the container and compactor repair parts, such parts became component parts of containers and compactors already located at customers' premises and thus were actually transferred to the customers in the same manner as the containers and compactors themselves.

Accordingly, it must be concluded that the equipment at issue was "actually transferred" to petitioner's customers, the purchasers of petitioner's taxable trash removal service, within the commonly accepted meaning of that phrase and within the meaning of Tax Law § 1101(b)(4)(i)(B) (Matter of Chem-Nuclear Systems, Inc., supra).

C. The remaining requirements of Tax Law § 1101(b)(4)(i)(B) have also been met. The containers, compactors, repair parts, and portable toilets were clearly actually transferred for use by petitioner in conjunction with the performance of the service subject to tax (see Findings of Fact "8" and "18").

D. In accordance with the foregoing, petitioner's purchases of containers, compactors, container and compactor repair parts, and Port-o-lets were not purchases at retail within the meaning of Tax Law § 1101(b)(4) and were therefore not subject to tax pursuant to Tax Law § 1105(a).

E. The Division seeks to factually distinguish the instant matter from Matter of Chem-Nuclear Systems, Inc. (supra). In that case, the Tax Appeals Tribunal held that certain liners used by the petitioner in its taxable service of processing nuclear waste were later actually transferred to the customer in conjunction with the performance of its taxable services. The Division correctly notes that, in contrast to the equipment at issue herein, the liners at issue in Chem-Nuclear were effectively consumed in the processing of nuclear waste, and could not be re-used.

The Division's argument is unconvincing. The Tribunal's holding in Chem-Nuclear does not require that property "actually transferred" in providing a taxable service be consumed in providing the service in order for the retail sale exclusion of Tax Law § 1101(b)(4)(i)(B) to apply. Interpretations of this clause, as noted previously, are to be guided by the "commonly accepted meaning" of the words therein (Matter of Chem-Nuclear Systems, Inc., supra). A review of this clause reveals no language whatever referring in any way to the consumption of the property later actually transferred. Indeed, consistent with this interpretation, the Tribunal, again in Chem-Nuclear, found that the phrase "actually transferred" did not require the transfer to be permanent. If the transfer need not be permanent, it logically follows that the property transferred may, at the completion of service, be re-used by the provider of services.

F. The Division also argued that the rule set forth in Albany Calcium Light Company, Inc. v. State Tax Commn. (44 NY2d 986, 408 NYS2d 333) should be controlling herein. In that case, the Court of Appeals affirmed a State Tax Commission determination that purchases of cylinders, used by a company to deliver gas to its customers, were not purchased for resale where the seller of the gas did not impose a separate charge for the use or rental of its cylinders. The Division's argument is rejected. Albany Calcium Light involved a seller of gas and whether the container (cylinder) in which the gas was delivered was purchased by the seller for the purpose of resale. (See also Valley Welding Supply Co. v. Chu, 131 AD2d 917; Niagara Lubricant Company, Inc. v. State Tax Commn., 120 AD2d 885, 502 NYS2d 312). The instant matter involves a provider of services taxable under Tax Law § 1105(c)(5) and whether that provider's purchase of certain property is excluded from the definition of retail sale pursuant to Tax Law § 1101(b)(4)(i)(B). Thus, in contrast to the instant matter, the section 1101(b)(4)(i)(B) exclusion did not apply in the Albany Calcium Light situation.

G. The Division also pointed to U-Need-A-Roll Off Corp. v. State Tax Commn. (67 NY2d 690) as precedent in support of its position. In that case, the Court of Appeals affirmed a State Tax Commission determination that, absent a separate charge, trash containers provided by a waste hauler to its customers were not purchased by the customer for resale. The only issue before the Court in that case was the resale exclusion. The "actually transferred" issue was not before the Court. U-Need-A-Roll Off is thus unsupportive of the Division's position.

H. In light of the foregoing Conclusions of Law, petitioner's alternative argument that the containers, compactors, container and compactor repair parts, and Port-o-lets were purchased exclusively for resale as such pursuant to Tax Law § 1101(b)(4)(i)(A) need not be addressed.

I. Since petitioner's purchase of repair services from outside contractors obviously involved purchases of services rather than tangible personal property, the retail sale exclusion of Tax Law § 1101(b)(4)(i)(B) is unavailable with respect to such purchases. It is therefore appropriate to consider whether petitioner purchased such services for resale, thereby excluding such services from sales tax. A determination as to whether these outside services were purchased for resale rests upon whether petitioner rented containers and compactors to its customers.

To determine whether petitioner was engaged in the rental of containers and compactors separate and apart from its waste removal service, it is imperative to consider the nature of

petitioner's business (see Matter of Atlas Linen Supply Company, Inc. v. Chu, 149 AD2d 824, 540 NYS2d 347; see also New York State Cable T.V. Assn. v. Tax Commn., 88 Misc 2d 601, 388 NYS2d 560, affd 59 AD2d 81, 397 NYS2d 205). Here, the record is clear that nearly all of petitioner's customers purchased a waste removal service. Incident to the provision of that service petitioner provided containers and compactors to its customers, thereby enabling petitioner to provide its service in a clean and efficient manner. Petitioner's own standard service agreement supports this characterization of its business as the agreement states that the containers and compactors are provided by petitioner "for [petitioner's own] convenience in providing the service." The provision of the containers and compactors to the customers was thus "inseparably connected" to the waste removal service and therefore cannot be considered separate transactions for sales tax purposes (see Atlas Linen Supply Company, Inc. v. Chu, supra, 540 NYS2d at 349).[2]

Petitioner's billing practices also show the existence of a single, integrated trash removal service. Petitioner's billing inconsistencies with respect to its container invoices and service agreements (Finding of Fact "10") reflect the artificiality of the separation of charges for container/compactor "use" and waste removal. This artificiality is further underscored by petitioner's practice of tying "use" charges to a customer's frequency of disposal (Finding of Fact "14"). Both of these facts indicate that petitioner itself did not consider its provision of containers and compactors to be true rentals.

Additionally, it is noted that the existence of separate "lease agreements" with respect to the compactors does not alter the conclusion reached herein that petitioner provided a service and did not rent equipment to its customers. The lease agreements were entirely contingent upon the customer's exclusive utilization of petitioner's removal services. Moreover, petitioner's requirement that its customers sign five-year

agreements was premised upon the significant cost of the equipment itself. Petitioner thus sought to insure that a customer would use its waste removal services for a five-year term. The provision of a compactor to the customer was thus an integral aspect of petitioner's waste removal service and cannot be separated out by the existence of a separate charge or agreement (see Matter of Penfold v. State Tax Commn., 114 AD2d 696, 494 NYS2d 552).

Accordingly, petitioner's purchase of repair services for its containers and compactors from outside contractors was properly subject to tax.

J. Petitioner has failed to show that its rental of containers for its own use (Finding of Fact "13") was not properly subject to tax. This component of the assessment, along with the outside repair purchases (Conclusion of Law "I") and the conceded landfill expenses (Finding of Fact "4", footnote "1"), is sustained.

K. The petition of Waste Management of New York, Inc. is granted to the extent indicated in Conclusion of Law "D"; the Division of Taxation is directed to adjust the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 16, 1987, in

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[2]That petitioner provided only containers or compactors to a handful of its customers is noted. These few transactions are properly characterized as rentals. However, as to these transactions petitioner has clearly failed to show such containers and compactors were used exclusively for resale (see Micheli Contracting Corp. v. State Tax Commn., 109 AD2d 957, 486 NYS2d 448).

accordance therewith; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
March 22, 1990

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE